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No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

STATE OF CONNECTICUT,
Petitioner,

v.

JEFFREY MITCHELL,
Respondent.

STATE OF CONNECTICUT,
Petitioner,

v.

HOWARD TINNEY, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTIONS PRESENTED

1. WHETHER AN EARLY MORNING SHOW-UP IDENTIFICATION OF SUSPECTS DETAINED UNDER TERRY V. OHIO, WHICH TOOK PLACE AT THE HOSPITAL WHERE THE CHILD VICTIM OF THE SEXUAL ASSAULT UNDER INVESTIGATION WAS RECEIVING TREATMENT, WAS UNNECESSARILY SUGGESTIVE BECAUSE THE VICTIM WAS NOT IN IMMEDIATE DANGER OF DEATH OR SERIOUSLY INJURED.

2. WHETHER THE RELIABILITY ASSESSMENT OF IDENTIFICATION TESTIMONY, MANDATED IN MANSON V. BRATHWAITE, REQUIRES A DECISION ON THE ULTIMATE BELIEVABILITY OF THE WITNESS OR SIMPLY ON THE EXISTENCE OF "SUFFICIENT ASPECTS OF RELIABILITY" IN THE IDENTIFICATION.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

The State of Connecticut petitions for a writ of certiorari to review the judgment of the Connecticut Supreme Court in this case.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 204 Conn. 523, __ A.2d __ (1987) and is fully reproduced in the petitioner's appendix. The opinion of the Connecticut Appellate Court is reported at 7 Conn. App. 46, 507 A.2d 1017 (1986). The petitioner's appendix includes an excerpt from that opinion.

JURISDICTION

The Connecticut Supreme Court rendered its decision on June 23, 1987. The petitioner's motion for reargument was denied on July 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . ."

STATEMENT

The respondents were charged in state court with sexual assault in the second degree and with creating a risk of injury to a child. After pleading not guilty, they joined in filing a motion to suppress identification testimony of the child victim as well as certain drug and other evidence seized upon their arrest and a motion to dismiss the cases. The trial court granted these motions, and upon the granting of permission of the trial court, the state

appealed. The state Appellate Court reversed the trial court, but was itself later reversed on the defendant's appeal by the state Supreme Court. App. at 3A-7A, 18A.

1. The facts pertaining to the child's identification testimony are undisputed. At 11:00 p.m. on the night of July 22, 1984, Ansonia police were called to the home of the child victim's grandmother. There the child, who was fourteen years old, reported that she had been vaginally and orally raped by two black men driving a white, bullet-shaped sports car. The police officers transported the child to a nearby hospital. App. at 3A-4A. En route, she gave additional descriptions of their clothing, age, height and weight. She stated that the attack had occurred in a

shopping center parking lot in the town of Derby. App. at 4A.

On the basis of this information, a Derby police officer proceeded to surveil the home of one of the respondents (Tinney), whom he knew was black and owned a white Mazda fitting the description of the automobile.[1] At 2:00 a.m. he saw a white Mazda drive up to the home. The respondent Tinney was driving and the respondent Mitchell was a passenger. Both matched the general description of the assailants given by the victim. App. at 4A.

The officer questioned them about the sexual assault, but both denied involvement and claimed that they had

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[1]. The police knew of the respondent Tinney because he was the son of a police commissioner in the City of Ansonia. October 10, 11, and 18, 1984 at 74-76.

been at a bar that evening. The officer nevertheless required both men to get into his cruiser and drive to the hospital. There they were kept waiting for about twenty-five minutes while a physician treated the victim. When the victim, seated in a wheel chair in the emergency room, was brought within twenty feet of the respondents, she positively identified the respondent Tinney as one of her assailants and said she was "pretty sure" the respondent Mitchell was the other. The respondents were then arrested. App. at 4A-5A.

The victim was then taken to the home of the respondent Tinney, where she identified the Mazda as the automobile she was assaulted in and several items within it that she recalled seeing during the assault. App. at 5A.

Later that same night, police asked the victim to reduce her statement to writing. The victim was unwilling to sign the statement, however, and insisted on speaking to her mother first. After doing so, she admitted to police that the assault had in fact occurred at a park in Ansonia where she had willingly accepted the respondents' invitation to go for a ride. They had taken her to Nolan Field, given her cocaine, and forced her to have sex with them. She explained the earlier inconsistent statement by saying that she did not want her mother to know that she had gone to an area mainly populated by black people, because of her mother's warning not to do so, and because she did not want her mother to know she had voluntarily entered the vehicle. App.

at 5A-6A.

2. On the respondents' motions, the trial court ruled that the hospital show-up was unnecessarily suggestive and, hence, inadmissible at trial. The court went on to find the child victim not to be credible as a matter of law because of the prior inconsistent statement that she gave to police and certain other minor inconsistencies in her description of her assailants.[2] It, therefore, suppressed any in court identification by the child.[3]

[2]. The child showed some confusion over the make of the car involved and the color of the clothing worn by one as opposed to the other, taller assailant. App. at 6A.

[3]. The court also suppressed the physical evidence seized from the respondents and the Mazda, having concluded that they had been seized in violation of the Fourth Amendment. App. at 7A. The propriety of this ruling is not at issue.

3. On appeal by the state, the Appellate Court reversed the trial court. It found that, while suggestive, the hospital show-up was not unnecessarily suggestive. App. at 22A. The court pointed to the need for prompt apprehension of the actual assailants and the need to arrest or release the respondents. It also went on to conclude that the identification was, in any event, reliable based on the totality of the circumstances.[4] The

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[4]. In holding that her identification was reliable, the Appellate Court observed that "the victim was in the automobile with her unmasked sexual assailants for two and one-half hours, with occasional light illuminating them .... Thus, her opportunity to view them and the degree of her attention were amply indicated. App. at 24A-25A. The court also pointed out that the victim's descriptions of her assailants were close to the mark; that she was positive about the identity of one of the defendants and "pretty sure" about the other; and that the identification

court noted that the question was not whether the child's identification testimony was actually believed by the trial court but, rather, whether it bore sufficient indicia of reliability to render it admissible in spite of the suggestiveness of the procedures leading to the identification. App. at 25A.

4. The state Supreme Court reversed. It concluded that, in order for a show-up procedure in these circumstances to be considered "necessary," the victim had to be "in immediate danger of death [or] seriously injured." Because this child victim was not, the procedure used was, in that court's view, unnecessarily suggestive. App. at 16A.

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followed the crime by only a few hours. App. at 25A.

The Connecticut Supreme Court also concluded that the trial court was entitled to find that the victim's identification testimony was unreliable under the totality of the circumstances and that a later photo-identification and any in-court identification by the child would be tainted.[5] App. at 18A.

REASONS FOR GRANTING THE WRIT

1. In Manson v. Brathwaite, 432 U.S. 116, 109-114 (1977) this Court identified the test to be employed where a defendant claims that admission of

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[5]. The Court remanded the case for trial without the suppressed identifications. App. at 21A. Because the federal questions presented by this petition have been finally resolved and further proceedings on remand could preclude review of those issues, this case is ripe for review by this Court. See, Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 482-83 (1975); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 3.10 (6th Ed. 1986).

identification testimony will deprive him of a fair trial because of police procedures used in the identification process. It identified the preliminary inquiry as whether the identification procedure was impermissibly or unnecessarily suggestive. Id. at 107-109. If it was, the Due Process Clause would not be violated by admission of that identification if it could be said that, based on "the totality of the circumstances" it was nevertheless reliable. Id. at 106, 114. This Court indicated that the reliability inquiry is limited to deciding whether the identification "possesses certain features of reliability"; id. at 110; that outweigh "the corrupting effect of the suggestive identifications"; id. at 114; leaving to "the good sense and

judgment of American juries" the ultimate question of its believability. Id. at 116.

2. This petition presents two questions. The first is whether the suggestive identification in the circumstances of this case was unnecessary simply because the victim was not in "immediate danger of death [or] seriously injured." The state Supreme Court's conclusion that these two circumstances are essential to render a suggestive identification nevertheless "necessary" is based upon a misreading of the decisions of this Court.

In Brathwaite this Court approved the state's concession that the suggestive identification there used was unnecessary and explained the absence of necessity as arising "because there was

no emergency or exigent circumstance." Id. at 109. In Stovall v. Denno, 388 U.S. 293 (1967), the principal case decided by this Court that addressed the necessity of a suggestive identification, the facts were viewed as compelling the procedure used. Id. at 302. The victim in Stovall was confined at a hospital near the jail for wounds she had received in the assault; she was the only person who could exonerate the accused; she could not visit the jail; and "no one knew how long she might live." Ibid. The accused was brought to the victim's hospital room and was there identified; he was later identified by the victim at trial as well. This Court said that the identification procedure, under the circumstances, "was imperative."

A suggestive identification was also deemed necessary in Simmons v. United States, 390 U.S. 377 (1968). In Simmons, a suggestive identification by photograph enabled federal agents, one day after the robbery under investigation, to determine whether they were "on the right track, so that they could properly deploy their forces"; Id. at 385; and so apprehend the perpetrators. This Court viewed these facts as sufficient to justify the suggestive procedure employed. Ibid.

The principle of necessity that controlled in these cases is equally applicable here. Although the child victim concededly was not in danger of death or seriously injured, the identification procedure used was nevertheless necessary because of exigent cir-

cumstances. First, the victim was being treated at the hospital because of the sexual assault. The location of the show-up was not determined by the convenience of either the police or the victim. Second, the suspects were being detained on the authority of Terry v. Ohio, 392 U.S. 1 (1968) for investigative purposes. The detention, though reasonably related in length to its justification, needed nevertheless to be as brief as possible. United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 1575-76 (1985). Third, as in Stovall, the victim was the only person who could exonerate the suspects. Fourth, a serious crime had been committed on a child; the prompt clearing of suspects in hand would enable police to use the crucial hours following the crime most

effectively in apprehending the assailants. See Simmons v. United States, 390 U.S. at 385. Under these circumstances, the admittedly suggestive identification was nevertheless as imperative here as it was in Stovall and Simmons. It was not the nature of the injuries the victim suffered or her closeness to death that created the exigency. It was, rather, the need for an immediate identification at the hospital that called for the procedure used.

3. The second question addresses the second prong of the due process test enunciated in Brathwaite. That prong calls for an examination of the reliability of suggestive identification testimony to determine whether it is nevertheless admissible without offend-

ing the defendant's right to a fair trial. Manson v. Brathwaite, 432 U.S. at 114. That inquiry need be reached, of course, only where the identification procedure used was unnecessarily suggestive, for in the face of necessity the Due Process Clause is not offended by a suggestive identification or its later admission at trial.

Although the trial court in this case never expressly concluded that the victim's out of court identification of the respondents was unreliable or that her in court testimony would also be unreliable or tainted by the suggestive identification, the state Supreme Court imputed to it such implied findings. App. at 17A-18A. It went on to conclude that these implied findings were not clearly erroneous because they could be

based upon the corrected statement the child gave and the confusion the child exhibited concerning various aspects of the description she gave of the assailants. App. at 17A. In short, the state Supreme Court concluded that the trial court had a right to disbelieve the identification testimony of the child.

The state Supreme Court clearly misunderstood the nature of the reliability inquiry. Unlike the Appellate Court, it chose to ignore the undisputed evidence concerning the Biggers factors: (1) the opportunity of the victim to view her assailants; (2) the degree of her attention; (3) the accuracy of her prior descriptions; (4) her level of certainty in the identification; and (5) the length of time between the crime and

the confrontation. Id. at 114-16.[6] The trial court never determined whether the identification possessed sufficient "features of reliability," but instead assessed the ultimate credibility of that identification and found it wanting. As a result, the child victim of a serious sexual crime was prevented from relating her earlier identification of her assailants and even from identifying them in open court.

Yet, under Brathwaite, it is clear that even a suggestive identification ought not to be excluded simply because it may have some "element of untrustworthiness." Id. at 116. This Court said: "Short of [a very substantial likelihood of irreparable misidentification, identification] evidence is for the jury

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[6]. See Footnote 4, supra.

to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Ibid. The decision of the Connecticut Supreme Court was, under this standard, clearly wrong.

4. Nevertheless, the limited resources of this Court ought not to be expended merely to correct a Constitutional error made by the highest court of a state. To warrant review the constitutional issue involved should be important both in terms of its constitutional significance and in terms of its national impact. This petition meets

both thresholds.

The constitutional importance of the questions here raised consists in the need to reach the proper balance between the right of the accused to a fair trial and the right of society to identify and punish criminal offenders. The result in the state courts in this case is intolerable, for it forbids the child victim of serious crimes from identifying her assailants in open court under circumstances that make one wonder whether we in fact live in a civilized society. Shall society and the victim be penalized because the injury inflicted by the assailants necessitated hospital treatment and, thus, precluded the use of customary identification procedures? Shall society and the victim be punished because the police,

insisting on a clear showing of probable cause, would not arrest the respondents until they had been positively identified? Ought not the suggestiveness of the identification procedure used here only affect the "weight and not [the admissibility]" of the testimony? Manson v. Brathwaite, 432 U.S. at 117. These questions strike at the heart of our system of criminal justice. See Morris v. Slappy, 461 U.S. 1, 14 (1983) (in the administration of justice courts may not ignore the interests of victims).

The questions raised are also of national significance. It is fair to say that eyewitness testimony is both the most common testimony in criminal trials and at the same time the most convincing evidence of guilt. See N.

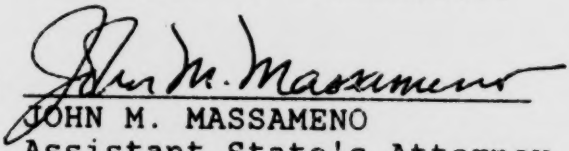
Sobel, Eyewitness Identification, Legal and Practical Problems, 1-1 to 1-8.1 (2d ed. 1986). Its exclusion under the Due Process clause is a very serious matter, for it may often result in the acquittal or non-prosecution of the accused. If the due process test enunciated by this Court ten years ago in Brathwaite is being misapplied in a way that deprives victims of crime and society at large of their day in court, then that constitutional error warrants correction by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

THE STATE OF CONNECTICUT

By: 

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APPENDIX
OF THE
PETITIONER

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OPINION OF THE CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT *v.* JEFFREY MITCHELL

STATE OF CONNECTICUT *v.* HOWARD TINNEY, JR.
(12977)

PETERS, C. J., HEALEY, SHEA, CALLAHAN and MULCAHY, Js.

The defendant in the first case and the defendant in the second case, following the granting of certification, appealed from the judgment of the Appellate Court reversing the judgment rendered by the trial court after that court granted motions by the defendants to suppress certain iden-

tification testimony, to suppress certain seized property and to dismiss the informations charging the defendants with the crimes of sexual assault in the second degree and risk of injury to or impairing the morals of a child. *Held:*

1. The defendants' claim to the contrary notwithstanding, the Appellate Court did not err in concluding that the police officers who apprehended the defendants had made a valid investigative detention of them and that, by transporting them for viewing by the victim at the hospital where she was being treated, the officers did not exceed the permissible scope of that detention.
2. Because it could not be said that the trial court's assessment of the identifications of the defendants by the victim in a hospital show-up was clearly erroneous, the Appellate Court erred in overturning that court's suppression of those identifications.
3. The Appellate Court correctly found error in the granting by the trial court of the defendants' motions to dismiss the informations against them; the victim's identification of the car used by her assailants and her description of her assailants, despite some inaccuracies, provided sufficient evidence to justify placing the defendants on trial.

Argued April 7— decision released June 23, 1987

Substitute information charging the defendants with the crimes of sexual assault in the second degree and risk of injury to or impairing the morals of a child, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number five, where the court, *Ramsey, J.*, granted the defendants' motions to dismiss and rendered judgments thereon, from which the state, on the granting of permission, appealed to the Appellate Court, *Dupont, Borden* and *Bieluch, Js.*; judgment reversing the trial court's decisions and remanding the cases for further proceedings, from which the defendants, on the granting of certification, appealed to this court. *Reversed in part; remanded for further proceedings.*

Milo J. Altschuler, for the appellants (defendants).

Michael E. O'Hare, assistant state's attorney, with whom were *John M. Massameno,* and, on the brief, *Gerard Esposito,* assistant state's attorneys, for the appellee (state).

SHEA, J. The Appellate Court set aside the judgments of the trial court granting the defendants' motions to exclude pretrial and in-court identifications, to suppress seized property, and to dismiss the information with prejudice in both cases. *State* v. *Mitchell,* 7 Conn. App. 46, 507 A.2d 1017 (1986). Having certified this combined appeal, we now conclude that the Appellate Court's judgment must be reversed with respect to the suppression of the identifications, which will therefore be excluded from evidence during further trial court proceedings in these cases.

Although the underlying facts are set forth in detail in *State* v. *Mitchell,* supra, we summarize those pertinent to the issues in this appeal. The defendants, Jeffrey Mitchell and Howard Tinney, Jr., were charged in two count informations with sexual assault in the second degree, in violation of General Statutes § 53a-71 (a) (1), and risk of injury to or impairing the morals of a child, in violation of General Statutes § 53-21. These charges arose out of an alleged sexual assault occurring on Sunday evening, July 22, 1984, upon a fourteen year old girl, which she reported to the Ansonia police department. In response to the complaint, officer Michael J. Kennedy went to see the victim at her grandmother's home in Derby at approximately 11 p.m. Shortly thereafter, officers Peter Zaskiewicz and Mark Ptak, also of the Ansonia police department, joined Kennedy and then took the victim to the Griffin Hospital in Derby.

While at her grandmother's home, the victim told Kennedy that she had been assaulted in the parking lot of the Bradlees Department Store in Derby by two men riding in a Datsun. En route to the hospital, Zaskiewicz conversed further with the victim, who then described her assailants' car as "a white, bullet-shaped sportscar with white wheels, which she identified as a Mazda." *State* v. *Mitchell,* supra, 50. Her assailants, she said,

were two black men in their early twenties, one taller than the other.

Because the victim stated that she had been assaulted in Derby, the Ansonia officers contacted the Derby police department, which dispatched officers Joseph Iacuone and Eugene Mascolo to the hospital at approximately 11:30 p.m. The victim elaborated upon her rendition, telling the Derby officers that, "as she was walking through the Bradlees parking lot, two men got out of a white, torpedo-shaped sports car with shiny wheels, which she thought was a Mazda, and chased her to the end of the lot, where they caught her and assaulted her near the adjacent Baskin-Robbins ice cream store." Id. The victim stated that the taller man wore maroon sweatpants and a tee shirt, and that the shorter man wore jeans and a tee shirt. She further said that one of the men was named "Mike."

At the hospital, Zaskiewicz told Derby officer Robert Proto, who had also been assigned to investigate the incident, "that he knew that the defendant, Howard Tinney, Jr., drove a white Mazda RX-7 with silver wheels." Id., 51. After Zaskiewicz had given Tinney's address on Scotland Road in Ansonia, Proto and Mascolo went to Scotland Road, arriving at the area of the Tinney residence about 2 a.m., the morning of July 23, 1984. A short while later, a white Mazda generally fitting the description given by the victim drove up followed by a white Thunderbird. Two black males exited the Mazda and entered the Thunderbird, which was being operated by a woman. Mascolo had recognized the shorter man as the defendant Tinney, who was wearing dark blue sweatpants and a tee shirt; the taller man was the defendant Mitchell, who wore jeans and a shirt. When the Thunderbird began to drive away, Proto pulled it over and advised the occupants that he was investigating a sexual assault.

Subsequently, in a ten minute talk with Zaskiewicz, who had joined the other officers, the defendants denied any involvement in the assault, claiming that they had spent the evening in Waterbury and in a bar in Ansonia. The defendants were told, nevertheless, that they "would have to go" to the Griffin Hospital for a field identification. Id. Upon arriving at the hospital between 2:15 and 2:30 .m., the defendants were required to wait in the police car about twenty-five minutes while a physician treated the victim. When the victim, seated in a wheelchair, was brought within twenty feet of the defendants, as they stood in the emergency room, she positively identified Tinney as one of her assailants, and said she was "pretty sure" Mitchell was the other.[1] Id., 52. At that point the defendants were arrested. The victim was next taken to Scotland Road, where she identified the white Mazda as the one driven by her assailants, and also claimed to recognize a helmet and a wicker basket visible through the rear window of the car.

Later, at approximately 4 a.m., at the Derby police headquarters, the victim retold her account of the assault. Upon being asked to sign the typewritten transcript of that account, she hesitated, and asked instead to talk to her mother. After speaking to her mother, the victim provided and then signed a version of the facts different from the one she had just given, claiming now that it was false. According to her new account, she had gone from her grandmother's house to Olson Drive in Ansonia at about 8:30 p.m. the previous eve-

[1] "Prior to the identification of the defendants, the victim had been asked to identify three other men at the hospital. The first two were young black men whom the police stopped on the street near the hospital and brought into the emergency room for a possible identification. The victim knew these two men and did not identify them as her assailants. The third was a black man who had come to the emergency room for treatment. The victim also knew him, and did not identify him as one of her assailants." *State* v. *Mitchell*, 7 Conn. App. 46, 52 n.1, 507 A.2d 1017 (1986).

ning. There she met a friend, who introduced her to two black men in a white sports car, whom she called "Jeff" and "Mike." Accepting the invitation of these two men to go for a ride, the victim was taken to Nolan Field, where, according to her statement, the men gave her cocaine and forced her to have sex with them.[2]

The white Mazda, which was registered to Tinney's mother, was towed to the Ansonia police department at about 6:30 a.m. At about 9:30 a.m., a warrant was issued to search the car. Items seized during the subsequent search included "glassine bags and cellophane packages with white powder traces, other materials commonly associated with cocaine use, and a 'cigarette lighter phone with residue.' " Id., 54.

The trial court ruled that, because "identification by one on one show-up is unnecessarily suggestive," the victim's identification of the defendants at the hospital was suppressible. The court further found the victim "not to be credible," referring to such factors as her admittedly fabricated first account of the crime and her confusion about the vehicle manufacturer, the color of the sweat pants, and the clothing in relation to the height of the assailants. As a result, the court also suppressed the photographic[3] and in-court identifications made by the victim, finding that they could not have been "wholly independent" of, but had been based upon, the earlier hospital identification.

[2] At the hearing on the defendants' motions, the victim stated "that she initially falsified the location and details of the assault because she did not want her mother to know that she had been in the Olson Drive area of Ansonia, which was an area mainly populated by black people, and that she did not want her mother to know that she had entered the car voluntarily." *State* v. *Mitchell*, 7 Conn. App. 46, 53 n.3, 507 A.2d 1017 (1986).

[3] Sometime after having identified the defendants at the hospital, the alleged victim identified the defendants from a photoboard. The defendants' pictures contained in the display were the mug shots taken of them on the night they were arrested.

Additionally, the trial court granted the defendants' motions to suppress evidence relating to the Mazda, the items found inside, and the property seized from the persons of the defendants. The court found that the defendants had been seized without probable cause. Calling the seizure of the car "warrantless and without justification," the court noted that no proof had been offered that "the Tinney vehicle was ever at the Baskin-Robbins or on Olson Drive," or that the helmet and wicker basket identified by the victim from outside the car, when she was taken from the hospital to view the Mazda as it was parked on Scotland Road, had previously been seen by her. Finally, the court granted the defendants' motions to dismiss the informations with prejudice, which motions claimed "insufficient reason or evidence to continue the prosecution . . . ." See General Statutes § 54-56; Practice Book § 815 (5). From the Appellate Court judgment setting aside the judgment of the trial court, the defendants have brought the present combined appeal.

I

The defendants first claim that the Appellate Court erred in concluding both that the police had made a valid investigative detention of the defendants on Scotland Road, and that the taking of the defendants to the hospital was within the permissible bounds of that detention. See *State* v. *Mitchell*, supra, 57–63. The defendants contend that, because their detention was illegal, any evidence obtained thereby must be suppressed, including the hospital identification by the victim, "mug shots," fingerprints, and the defendants' clothing.[4] We find this ground for suppression of the evidence to be unpersuasive.

[4] The defendants purport to rely upon both article first, § 7 of our state constitution and the fourth amendment to the United States constitution. The defendants quote the language of this court in *State* v. *Kimbro*, 197 Conn. 219, 233, 496 A.2d 498 (1985), that article first, § 7 "affords more

A

We first examine the reasonableness of the warrantless stop on Scotland Road of the defendants by officers Proto, Mascolo, and Zaskiewicz. We agree with the Appellate Court that "the stop of the defendants on Scotland Road was not an arrest, which would have required probable cause, but was an investigative stop requiring only reasonable and articulable suspicion." *State* v. *Mitchell,* supra, 58; see *Delaware* v. *Prouse,* 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *State* v. *Januszewski,* 182 Conn. 142, 147–48, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981). The constitutional issue raised by this stop, therefore, is whether the actions of the Derby and Ansonia police officers exceeded the permissible limits of an investigative detention under *Terry* v. *Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968).

The state concedes on appeal that, as the trial court found, the defendants were "seized" in the sense that

substantive protection to citizens than does the fourth amendment to the federal constitution in the determination of probable cause." In *Kimbro,* this court discussed the proper test to be applied in determining whether an informant's tip had provided a sufficient basis for a finding of probable cause. We rejected the "totality of the circumstances" analysis set out by the United States Supreme Court in *Illinois* v. *Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527, reh. denied, 463 U.S. 1237, 104 S. Ct. 33, 77 L. Ed. 2d 1453 (1983), adopting instead the stricter two-prong *"Aguilar-Spinelli"* test, which considers, on the one hand, an informant's "veracity" and "reliability," and, on the other hand, his "basis of knowledge." See *Aguilar* v. *Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli* v. *United States,* 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). We decline to extend our disparate treatment of state and federal search and seizure provisions to the facts of this case. See *State* v. *Braxton,* 196 Conn. 685, 688 n.2, 495 A.2d 273 (1985); see also *State* v. *Ostroski,* 186 Conn. 287, 290–92, 440 A.2d 984, cert. denied, 459 U.S. 878, 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982); *State* v. *Derrico,* 181 Conn. 151, 157–58, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 789, 66 L. Ed. 2d 607 (1980); *State* v. *Duhaime,* 33 Conn. Sup. 129, 133, 365 A.2d 837 (1976).

they were "not free to leave" when they were stopped on Scotland Road. It has been frequently iterated that the constitution forbids only unreasonable searches and seizures. See *Terry* v. *Ohio*, supra, 9; *Elkins* v. *United States*, 364 U.S. 206, 222, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960); *State* v. *Januszewski*, supra, 148. *Terry* v. *Ohio* established that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry* v. *Ohio*, supra, 22. In determining what cause is sufficient to authorize police to stop a person, courts have considered whether, based upon "the totality of the circumstances," the detaining officers had " 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' " *United States* v. *Cortez*, 449 U.S. 411, 417–18, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); see also *Brown* v. *Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975); *State* v. *Scully*, 195 Conn. 368, 674, 490 A.2d 984 (1985). "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry* v. *Ohio*, supra, 21 n.18; see also *State* v. *Aillon*, 202 Conn. 385, 399, 521 A.2d 555 (1987); see generally 3 W. LaFave, Search and Seizure (1987) § 9.3 (b).

We conclude that Proto, Mascolo and Zaskiewicz were justified in stopping the defendants based upon the victim's descriptions of the assailants and their car. Those descriptions were sufficient to give rise to a reasonable suspicion that the defendants were the two black males who had assaulted the victim. See *United States* v. *Hensley*, 469 U.S. 221, 229, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985) (extending *Terry* to permit

detention of persons reasonably suspected of involvement in completed crime). The age of the defendants, their relative heights, the fact that one wore jeans while the other wore sweatpants and that the two were riding in a white Mazda sports car were all characteristics that corresponded to the information given by the victim. We agree with the Appellate Court that the existence of discrepancies between the victim's descriptions and the actual appearance of the defendants "does not, in and of itself, vitiate the reasonable suspicion created by the similarities." *State* v. *Mitchell*, supra, 59. See also *District of Columbia* v. *M.M.*, 407 A.2d 698, 701 (D.C. App. 1979); *Matter of J.G.J.*, 388 A.2d 472, 474 (D.C. App. 1978).

The test enunciated by the United States Supreme Court of whether an investigative stop passes constitutional muster balances the nature of the intrusion upon personal security against the importance of the governmental interest inducing the intrusion. See *United States* v. *Hensley*, supra, 228. A strong law enforcement interest has been particularly recognized in the context of felonies or violent crimes, because "it is in the public interest that the crime be solved and the suspect detained as promptly as possible." Id., 229. Furthermore, when the situation in which a suspect has been detained has afforded him a lesser expectation of privacy; see, e.g., *Rakas* v. *Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *South Dakota* v. *Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); fourth amendment protections have been deemed to be correspondingly less stringent. *Winston* v. *Lee*, 470 U.S. 753, 767, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985). A felony such as the one reported in the present case, a sexual assault upon a child, is certainly among those warranting prompt resolution. The defendants were detained on a public street at approximately 2 a.m., circumstances that are reasonably

regarded as involving a less than maximal expectation of privacy. See generally *Adams* v. *Wiliams*, 407 U.S. 143, 147–48, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); *State* v. *Carter*, 189 Conn. 611, 617, 458 A.2d 369 (1983). Thus, our conclusion that the initial stop of the defendants was constitutionally valid is consistent with an evaluation of that stop under the delineated balancing test.

B

We must next determine whether the police, in transporting the defendants to the hospital for a viewing by the victim, exceeded the permissible scope of the investigative detention. A *Terry* stop that is justified at its inception can become constitutionally infirm if it lasts longer or becomes more intrusive than necessary to complete the investigation for which that stop was made. See *United States* v. *Sharpe*, 470 U.S. 675, 684, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985); *Florida* v. *Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). "Like the determination of initial justification, this inquiry is fact-bound." *State* v. *Aillon*, supra, 401. See also P. Bator & J. Vorenberg, "Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions," 66 Colum. L. Rev. 62, 63 (1966). "The results of the initial stop may arouse further suspicion or may dispel the questions in the officer's mind. If the latter is the case, the stop may go no further and the detained individual must be free to go. If, on the contrary, the officer's suspicions are confirmed or are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances." *State* v. *Watson*, 165 Conn. 577, 585, 345 A.2d 532 (1973); see also *State* v. *Aillon*, supra; *State* v. *Carter*, supra, 618.

The record indicates that, from the initial stop to the ultimate identification by the victim at the hospital, a

total of thirty-nine minutes elapsed. During that period, the detaining officers spoke with the defendants, who were seated in their friend's car, for about ten minutes, drove the defendants to the hospital, a ride lasting about four minutes, and then caused the defendants to remain seated in the police car for some twenty-five minutes while the victim was being treated, "during which time Tinney asked if he could call his father and was told by Proto that 'as soon as we finish you can do anything you want . . . .' " *State* v. *Mitchell*, supra, 52.

The United States Supreme Court has acknowledged that there may be "difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest. Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on *Terry* stops." *United States* v. *Sharpe*, supra, 685. The court in *Sharpe* continued, setting forth the following test: "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." Id., 686; see also *Michigan* v. *Summers*, 452 U.S. 692, 701 n.14, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), quoting 3 W. LaFave, Search and Seizure (1978) § 9.2, p. 40.

Our review of the record convinces us that the Appellate Court correctly concluded that the detaining officers acted diligently to pursue a means of investigation that was likely to confirm or dispel their suspicions quickly, i.e., "display of the defendants to the victim while her memory was still fresh . . . ." *State* v. *Mitchell*, supra, 62. It is beyond dispute that the major portion of the detention, the twenty-five minute wait

while a physician treated the victim, did not result from any dilatoriness on the part of the officers. Moreover, the denial by the defendants of any involvement in the sexual assault, during their initial talk with the officers, was not necessarily so convincing as to have dispelled the questions in the officers' minds. *State* v. *Watson*, supra. We conclude that, under the circumstances of this case, the defendants' thirty-nine minute detention was reasonable. Compare *United States* v. *Sharpe*, supra, 686–88 (twenty minute stop held to be reasonable), and *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924, 95 S. Ct. 1118, 43 L. Ed. 2d 393 (1975) (one hour detention held to be reasonable), with *United States* v. *Place*, 462 U.S. 696, 710, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) ("the prolonged 90-minute detention . . . is sufficient to render the seizure unreasonable").

We note that detaining a suspect to effectuate a viewing by witnesses to a crime has been deemed to be a permissible investigative technique. See *United States* v. *Short*, 570 F.2d 1051, 1054 (D.C. Cir. 1978); *State* v. *Aversa*, 197 Conn. 685, 692, 501 A.2d 370 (1985); *Buckingham* v. *State*, 482 A.2d 327, 334 (Del. 1984); *Davis* v. *United States*, 498 A.2d 242, 245 (D.C. App. 1985); *Finney* v. *State*, 420 So.2d 639, 643 (Fla. App. 1982); *People* v. *Canity*, 100 Ill. App. 3d 135, 149–50, 426 N.E.2d 591 (1981); *State* v. *Byers*, 85 Wash.2d 783, 785, 790, 539 P.2d 833 (1975); *State* v. *Isham*, 70 Wis.2d 718, 724, 235 N.W.2d 506 (1975); cf. *People* v. *Harris*, 15 Cal.3d 384, 391, 124 Cal. Rptr. 536, 540 P.2d 632 (1975). Further, requiring a suspect to accompany a police officer to another place, after *Terry*, does not necessarily transform what would otherwise be a permissible investigatory seizure into an arrest. See *United States* v. *Short*, supra; *People* v. *Stevens*, 183 Colo. 399, 407, 517 P.2d 1336 (1974); *State* v. *Griffin*, 459 A.2d 1086, 1089–90 (Me. 1983); *State* v. *Byers*, supra, 790.

In sum, we find no error in the conclusion of the Appellate Court that the seizure of the defendants, from the initial stop on Scotland Road to the viewing by the victim at the hospital, was a valid investigative detention. Accordingly, we disagree with the defendants that the seizure provides a basis for the suppression of the hospital identification and of any other evidence consequently obtained from the persons of the defendants.[5]

II

The defendants next claim that the Appellate Court erred in holding that the initial identification of the defendants by the victim at the hospital was neither impermissibly suggestive nor unreliable. The trial court had determined that, because "identification by one on one show up is unnecessarily suggestive," and because the subsequent out-of-court and in-court identifications were a product of the hospital viewing, such identifications must be suppressed. We conclude that the trial court's granting of the defendants' motions to suppress the identifications was not erroneous as a matter of law, and, therefore, that the holding of the Appellate Court to the contrary must be reversed.

[5] In this appeal, the defendants do not take issue with the holding of the Appellate Court that, "once the victim identified them at the hospital, probable cause to arrest them clearly existed. Thus, their arrests were valid, as were any searches of their persons that followed." *State* v. *Mitchell*, 7 Conn. App. 46, 70, 507 A.2d 1017 (1986); see *State* v. *Magnotti*, 198 Conn. 209, 214, 502 A.2d 404 (1985). Although, in the discussion that follows, we reverse the Appellate Court in respect to the validity of the hospital identification, the conclusion of the Appellate Court that there was probable cause to arrest the defendants remains valid. The suggestiveness of the identification procedure, which requires suppression of the victim's identification at a trial, does not substantially detract from the reasonableness of police reliance upon that identification in concluding that there was probable cause for an arrest of the defendants. Cf. *Jones* v. *United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960); *Draper* v. *United States*, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959); *Brinegar* v. *United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

This court has adopted a two-pronged inquiry in determining whether identification procedures have violated a defendant's due process rights. First we address whether the identification procedure was unnecessarily suggestive. If so, the second question becomes whether the identification was nevertheless reliable based on an examination of the "totality of the circumstances." See *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *State* v. *Ramsundar*, 204 Conn. 4, 10, A.2d (1987); *State* v. *Miller*, 202 Conn. 463, 470, 522 A.2d 249 (1987); *State* v. *Theriault*, 182 Conn. 366, 371–72, 438 A.2d 432 (1980).

The show-up, or one-to-one confrontation between a victim and the suspect police present to him, has been deemed "inherently and significantly suggestive; *State* v. *Middleton*, 170 Conn. 601, 608, 368 A.2d 66 (1976); because it conveys the message that the police have reason to believe the suspect guilty. *State* v. *Willin*, 177 Conn. 248, 251, 413 A.2d 829 (1979)." *State* v. *Maturo*, 188 Conn. 591, 595–96, 452 A.2d 642 (1982); see also *State* v. *Guertin*, 190 Conn. 440, 456, 461 A.2d 963 (1983). Upon finding suggestive circumstances, courts have then asked whether such circumstances were impermissible or unnecessary. See *Stovall* v. *Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). Hospital room show-ups have been upheld as necessary where a serious injury has disabled the witness or defendant. See *Stovall* v. *Denno*, supra; *Trask* v. *Robbins*, 421 F.2d 773, 775 (1st Cir. 1970); *Johnson* v. *People*, 172 Colo. 72, 81, 470 P.2d 37 (1970); *People* v. *Young*, 6 Ill. App.3d 119, 123, 285 N.E.2d 159 (1972); *People* v. *Rivera*, 22 N.Y.2d 453, 455, 293 N.Y.S.2d 271, 239 N.E.2d 873 (1968). In other instances, however, hospital show-ups have been considered unnecesssary because the suspect or witness has been in no immediate danger of death. See *Smith* v. *Coiner*, 473 F.2d 877, 880–81 (4th Cir.), cert. denied

sub nom. *Wallace* v. *Smith*, 414 U.S. 1115, 94 S. Ct. 848, 38 L. Ed. 2d 743 (1973); *People* v. *Stock*, 15 Ill. App. 3d 722, 728, 304 N.E.2d 646 (1973).

In the present case both defendants were brought into the foyer of the hospital emergency room. The victim, seated in a wheelchair, was wheeled by them twice. This identification procedure was inherently suggestive. Because the victim, at the time of the show-up, was neither in immediate danger of death nor seriously injured, the trial court's finding that such suggestiveness was unnecessary was not unreasonable. Although it might have been difficult to assemble a full lineup at 2:30 a.m., the victim, taken immediately after the show-up to Scotland Road to view the Mazda, could just as readily have been taken to view the defendants in a more neutral setting. Even presenting the defendants to the victim individually, rather than as a pair, would certainly have been a less suggestive alternative. Thus, we disagree with the Appellate Court's assertion that the initial identification procedure was not impermissibly suggestive.

The next inquiry under the two-pronged approach is whether the hospital identification, in the context of the totality of the circumstances, was nevertheless reliable. The factors to be considered in making this determination "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Manson* v. *Brathwaite*, supra, 114; *State* v. *Ramsundar*, supra, 10–11. The Appellate Court stated that a careful reading of *Manson* indicates that this reliability inquiry "is a question of admissibility of evidence, not of whether the identification is to be

believed . . . . Short of the point at which the identification procedure produces ' "a very substantial likelihood of irreparable misidentification" '; [*Manson* v. *Brathwaite*, supra, 116]; the identification 'evidence *is for the jury to weigh* . . . .' (Emphasis added.) Id., 116." *State* v. *Mitchell*, supra, 66.

Although, based on the allegations of the victim, the trial court might reasonably have regarded the hospital identification as sufficiently reliable to protect the defendants' due process rights, we cannot agree with the Appellate Court that such a conclusion was required as a matter of law. The reliability inquiry delineated in *Manson* is fact-bound and made on an ad hoc basis. Generally, where the admissibility of evidence depends upon a preliminary question of fact to be determined by the court, "its decision is not to be reversed unless there is clear and manifest error." *Engelke* v. *Wheatley*, 148 Conn. 398, 410–11, 171 A.2d 402 (1961); see Practice Book § 4061; *State* v. *Briyandi*, 186 Conn. 521, 530, 442 A.2d 927 (1982).

In its oral memorandum of decision, the trial court expressed concern about such factors implicating the reliability determination as the victim's degree of attention and the accuracy of her prior description of the assailants. The court referred to the victim's inability to describe the shirts worn by her assailants after allegedly having been with them for two and one-half hours, "the fact that she initially thought the car was a Datsun and that she had never made a positive [identification] of [the defendant] Mitchell," and the victim's confusion about the "size and facial characteristics and clothing" of her assailants, and also about their names and the color of the sweatpants worn by one of them. Although the trial court did not expressly structure these concerns into a reliability inquiry, or style them as such, we note that the state did not seek an articulation of the factual basis for the court's conclusions

as provided in Practice Book § 4051. See *Foster* v. *Waterford,* 186 Conn. 692, 694 n.4, 443 A.2d 490 (1982); see also *Carpenter* v. *Carpenter,* 188 Conn. 736, 739 n.2, 453 A.2d 1151 (1982); *Kaplan* v. *Kaplan,* 186 Conn. 387, 388 n.1, 441 A.2d 629 (1982). Because it cannot be said that the trial court's assessment of the hospital identification of the defendants by the victim was clearly erroneous, we must reverse the decision of the Appellate Court in respect to that identification.

Concluding that the trial court had erred in granting the defendants' motions to suppress the hospital identification, the Appellate Court found no need to inquire whether that initial identification had tainted the subsequent photographic and in-court identifications. See *State* v. *Mitchell,* supra, 67. That the initial identification had been invalid, however, placed the state under a constitutional restraint to establish an independent basis for the subsequent identifications. Thus, the burden was on the state to establish by clear and convincing evidence that the subsequent identifications were based on the victim's independent recollection. See *State* v. *Guertin,* supra, 459; *State* v. *Gold,* 180 Conn. 619, 656, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980); *State* v. *Lee,* 177 Conn. 335, 339–40, 417 A.2d 354 (1979). The trial court found that the state "should have but has not proven to the Court that the [photographic and in-court identifications made by the victim] could be wholly independent . . . of the one on one identification made at the Hospital . . . ." Nothing in the record demonstrates that the court exceeded its prerogative as the trier in drawing that conclusion. We conclude that the Appellate Court erred in overturning the trial court's judgment in respect to the granting of the defendants' motions to suppress the hospital and subsequent identifications.

III

The defendants' final claim is that the Appellate Court erred in reversing the trial court's dismissal of the pending informations based on the insufficiency of the evidence. The Appellate Court determined, in effect, that the trial court, in granting the defendants' motions to dismiss, had abused the discretion conferred upon it by General Statutes § 54-56.[6] That statute allows the court to dismiss an information at any time, upon motion of the defendant, "if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial." General Statutes § 54-56; see *State* v. *Corchado*, 200 Conn. 453, 460, 512 A.2d 183 (1986). We affirm the judgment of the Appellate Court in this respect.

In this appeal the defendants have not challenged the holding of the Appellate Court that defendant Tinney's white Mazda and the evidence seized therein had been improperly suppressed because, "[o]nce the victim positively identified the car as the one in which her assailants were sitting before they chased her and assaulted her, the police had probable cause to believe that the car contained evidence of the crime. . . . Once the police lawfully seized the vehicle on the basis of proba-

[6] "[General Statutes] Sec. 54-56. DISMISSAL OF INFORMATION BY COURT. All courts having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations and criminal cases pending therein and may, at any time, upon motion by the defendant, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial."

See also Practice Book § 815 (5), which provides: "The following, if capable of determination without a trial of the general issue, shall, if made prior to trial, be raised by a motion to dismiss the indictment or information . . . . (5) Defenses or objections based on the insufficiency of evidence or cause to justify the bringing or continuing of such information or indictment or the placing of the defendant on trial . . . ."

ble cause, they had the authority to search it without the necessity of securing a warrant."[7] *State* v. *Mitchell*, supra, 71. See also *United States* v. *Johns*, 469 U.S. 478, 484, 105 S. Ct. 881, 83 L. Ed. 2d 890 (1985); *United States* v. *Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); *State* v. *Johnson*, 183 Conn. 148, 154, 438 A.2d 851 (1981). The defendants are therefore deemed to have abandoned any claim of error in respect to this holding. See *Pepe* v. *New Britain*, 203 Conn. 281, 282 n.1, A.2d (1987); *Blancato* v. *Feldspar Corporation*, 203 Conn. 34, 36 n.3, 522 A.2d 1235 (1987); *State* v. *Bowen*, 167 Conn. 526, 533, 356 A.2d 162 (1975).

"On a motion to dismiss an information, the proffered proof is to be viewed most favorably to the state." *State* v. *Morrill*, 193 Conn. 602, 611, 478 A.2d 994 (1984). Wholly apart from the victim's identifications of the defendants, we agree with the state that her positive identification of the Mazda, including her recognition of some of the items contained therein, and her description of her assailants, despite some inaccuracies, provide sufficient evidence of the defendants' identity as her assailants to justify placing the defendants on trial. General Statutes § 54-56. Accordingly, we conclude

[7] In the Appellate Court the defendant Tinney argued that the warrant issued at 9:30 a.m., July 23, 1984, to search his car was invalid. This defendant premised his contention "on the fact that the supporting affidavit, which tracked the victim's second, signed statement describing the incident as it occurred in the car at Nolan Field, did not disclose that the victim had earlier given a different and false version to the police. Thus, Tinney argues, the warrant was invalid under *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)." *State* v. *Mitchell*, 7 Conn. App. 46, 71-72, 507 A.2d 1017 (1986). Although it had concluded that the police had the authority, in this case, to search the car without the necessity of having secured a warrant, the Appellate Court noted that, in any event, Tinney had conceded at oral argument that he had failed to make the "substantial preliminary showing" required by *Franks* as a precondition to obtaining an evidentiary hearing challenging the truthfulness of an affidavit supporting a search warrant. See id., 72; see generally *Franks* v. *Delaware*, supra, 155-56, 171-72.

that the Appellate Court correctly found error in the granting by the trial court of the defendants' motions to dismiss.

The judgment of the Appellate Court is reversed in part, and the cases are remanded to that court with direction to remand them to the trial court for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

EXERPT FROM THE OPINION OF THE APPELLATE COURT

THE IDENTIFICATION OF THE DEFENDANTS

The trial court ruled that Connecticut case law is that "identification by one on one show-up is unnecessarily suggestive" and that, therefore, the identification of the defendants by the victim at the hospital was suppressible. It also concluded, on the basis of this ruling and of its finding of the victim "not to be credible," that any subsequent out-of-court and in-court identifications of the defendants by the victim could not be wholly independent of that first identification, and that those subsequent identifications must be suppressed as well. We agree with the state that the court erred in its analysis of the identification issue and in the result it reached.

First, our law is clear that while a one-on-one show-up is inherently suggestive, it does not automatically follow that such a show-up is *impermissibly* suggestive. See, e.g., *State* v. *Hamele,* 188 Conn. 372, 376–77, 449 A.2d 1020 (1982); *State* v. *Nelson,* 4 Conn. App. 514, 516–17, 495 A.2d 298 (1985). A critical factor in determining whether a show-up is impermissibly suggestive is that " 'the benefits of promptness not only aid reliability but permit a quick release of an innocent party if there is no positive identification and allow the police to resume the investigation with a minimum of delay.' " *State* v. *Hamele,* supra, 377. Here, as in *Hamele,* the show-up occurred during the early morning hours shortly after the incident and the seizure of the defendants. It was important for the police to determine promptly whether the defendants were involved. The defendants had protested their innocence, and there were no readily identifiable items of the victim in their possession. Id. Under these circumstances, the show-up at the hospital cannot be deemed to be impermissibly suggestive. Id., 377–78.

Second, even if an identification procedure is found to be impermissibly suggestive, the identification is admissible if it is found to be nevertheless reliable based on examination of the totality of the circumstances. Id., 376. In ruling on this second prong of the identification analysis, namely reliability, the trial court's function, however, is *not* to determine whether the identification made by the witness should be believed. That is the function of the ultimate factfinder in the case. The trial court's function in employing a reliability analysis is to determine only whether the identification was made under circumstances carrying sufficient objective *indicia of reliability* to permit the identification into evidence, and thus to permit the ultimate factfinder to make the decision of whether to believe it. When those objective indicia of reliability are missing or are sufficiently in doubt, the impermissible suggestiveness of the identification cannot be overcome by those indicia, and the factfinder must then be insulated from the suggestiveness of the identification. The trial court's function, then, in performing the reliability analysis is limited; it is to make a preliminary determination of whether those objective indicia of reliability are sufficiently present to enable the ultimate question of the accuracy of the identification to go to the factfinder.

This view of the trial court's proper function derives from a careful reading of the fountainhead case on the reliability factor. *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). In *Manson*, the Supreme Court held that, even if an out-of-court identification procedure was impermissibly suggestive, the identification is admissible if it was reliable based on the totality of the circumstances. Id., 116. "[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ." Id., 114. The factors weighing on reliability, "to be weighed [against]

the corrupting effect of the suggestive identification itself"; id.; include the opportunity of the victim to view the criminal, the degree of attention of the victim, the accuracy of the victim's prior description, the level of certainty of the identification, and the time lapse between the crime and identification. Id.

A careful reading of that case makes clear that this is a question of admissibility of evidence, not of whether the identification is to be believed. Under *Manson*, the totality of circumstances test "permits the *admission* of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification *possesses certain features of reliability.*" (Emphasis added.) Id., 110. The test of admissibility is the protection of "an *evidentiary* interest . . . ." (Emphasis added.) Id., 113. Short of the point at which the identification procedure produces " 'a very substantial likelihood of irreparable misidentification' "; id., 116; the identification "evidence *is for the jury to weigh* . . . for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (Emphasis added.) Id., 116. The holding of the case "correctly relies only on appropriate *indicia of the reliability of the identification itself.*" (Emphasis added.) Id., 118 (Stevens, J., concurring). This understanding of *Manson* v. *Brathwaite*, supra, is buttressed by its numerous progeny in our Supreme Court and in this court. See, e.g., *State* v. *Amarillo*, 198 Conn. 285, 294, 503 A.2d 146 (1986) (under the totality of the circumstances, the identification was sufficiently reliable to warrant its admission into evidence); *State* v. *Perez*, 198 Conn. 68, 77, 502 A.2d 368 (1985); *State* v. *Soriano*, 2 Conn. App. 127, 132, 476 A.2d 633 (1984). In this case, the evidence at the hearing was that the victim was in the automobile with her unmasked sexual assailants for two and

one-half hours, with occasional light illuminating them from the phone cigarette lighter. Thus, her opportunity to view them and the degree of her attention were amply indicated. *State* v. *Amarillo,* supra (crime of sexual assault offers greater opportunity for observation of perpetrators than any other crime). Her description of them, both as to their physical features and clothes, while inaccurate in some respects, was certainly close enough to the mark to permit a jury to assess its ultimate correctness. She positively identified one of the defendants and was "pretty sure" about the other. The time between the crime and the identification was but a few hours. Moreover, the confrontation process itself took place in a well-lit neutral setting, and there was no evidence of prompting by the police. We cannot but conclude that the identification at the hospital possessed sufficient indicia of reliability so as to permit the identification evidence ultimately to be weighed by a jury.

This conclusion disposes of the defendants' claim that the subsequent photographic identification, which the defendants do not claim was suggestively conducted, was properly suppressed. Since the initial identification procedure was not impermissibly suggestive and the identification was sufficiently reliable, there is no need to inquire whether it tainted any subsequent photographic identification. *State* v. *Findlay,* 198 Conn. 328, 336–37, 502 A.2d 921 (1986); *State* v. *Nelson,* supra, 517. That subsequent identification is not suppressible. Nor, therefore, is any subsequent in-court identification, which the trial court also suppressed.[5]

[5] Despite the trial court's finding that the state did not prove "that the identification that [the victim] made in Court could be wholly independent of the one-on-one identification made at the hospital," the record is clear that the victim was not permitted, at the defendants' insistence, to make any in-court identification of the defendant at the hearing in the trial court. When the state attempted to have her do so, the defendants objected, claim-

Thus, the court erred, not only in suppressing the identification of the defendants at the hospital, but in suppressing any subsequent identifications.

In this connection, we address the negative findings of the trial court regarding the victim's credibility in this case. The trial court specifically found the victim not to be credible. It also expressed amazement at the absence of Kevin Johnson as a witness to testify about the victim's initial contact with the defendants, and at the absence of any medical or scientific evidence to corroborate the victim's statements to the police about the sexual assault on her by the defendants and about the defendants' giving her drugs. In assessing her credibility about these matters in the context of the proceedings before it, the trial court exceeded its proper bounds. The motions before the court did not call upon the trial court to make this particular credibility determination.

The motions to suppress the identification asserted that the defendants were in custody on less than probable cause, that the show-up was unnecessarily suggestive, and that the later photographic identification and any in-court identification were tainted by the illegal show-up. The factual and legal issues raised by these claims did not concern the ultimate question of whether the victim was telling the truth when she described, either to the police on the evening in question or at the hearing on the motions, the assault on her and the defendants' part in that assault. The question of her credibility about these matters is a question which the ultimate fact finder, jury or court, will have to answer. The factual and legal issues before the court on this motion involved the question of whether the police, confronted with the information given to them by the vic-

ing that "[w]hether or not the gentlemen in question are identifiable by [the victim] is not relevant to these proceedings at all." In response, the state withdrew the question, and the court said, "[i]t may be withdrawn."

tim and the information obtained through their own efforts, acted reasonably and within applicable constitutional restraints. This question does not turn on the victim's credibility.

Thus, the trial court also erred by focusing on the absence of Kevin Johnson as a witness and on the lack of medical or other evidence to corroborate the victim's statements. The state can hardly be taken to task for failing to produce, at this hearing on the constitutional admissibility of evidence, material which is properly reserved for the trial on the issue of guilt. The same reasoning applies to the disposition of the defendants' motions to suppress the evidence obtained as a result of the search of their persons and of Tinney's car, discussed more fully below. Since the issue on that motion was whether the car was seized with probable cause, the focus should not have been on the ultimate question of whether the victim was telling the truth, but on whether the police acted reasonably on the basis of the information furnished by the victim and the other facts disclosed to them during their investigation of her complaint.

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No. 87-434

In The

Supreme Court of the United States

October Term, 1987

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STATE OF CONNECTICUT

vs.

JEFFREY MITCHELL

STATE OF CONNECTICUT

vs.

HOWARD TINNEY, JR.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

—o—

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QUESTIONS PRESENTED

I. DID THE CONNECTICUT SUPREME COURT ERR IN HOLDING THAT A ONE-ON-ONE SHOW-UP AT A HOSPITAL WAS UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE WHEN THE FOURTEEN-YEAR-OLD ALLEGED VICTIM WAS NOT CONFINED TO THE HOSPITAL AND IMMEDIATELY AFTER THE SHOW-UP SHE WAS TAKEN BY THE POLICE TO VIEW A MOTOR VEHICLE OPERATED BY ONE OF THE SUSPECTS AND THEN TO THE POLICE STATION TO GIVE A WRITTEN STATEMENT?

II. DID THE CONNECTICUT SUPREME COURT ERR IN UPHOLDING THE TRIAL COURT'S FACT-BASED DECISION THAT THERE WERE NOT SUFFICIENT INDICIA OF RELIABILITY IN THE IDENTIFICATION BY THE ALLEGED VICTIM TO ALLOW AN IN-COURT IDENTIFICATION OR ANY EVIDENCE OF THE IMPERMISSIBLE AND UNNECESSARY IDENTIFICATION PROCEDURE?

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COUNTERSTATEMENT OF THE CASE

The trial court, at pretrial hearings, granted a motion by the defendants to disallow any in-court identification of the defendants by the fourteen-year-old alleged victim of a sexual assault. The Appellate Court of the State of Connecticut reversed the trial court on this issue as well as on several other motions filed by the defendant which the trial court had granted. The Connecticut Supreme Court reversed the Appellate Court on the identification issue and upheld the Appellate Court on all other isses.

The factual background of this case is fairly well set out by the State in its petition at pages four through seven of said petition. Said facts are also set out in greater detail in the opinion of the Connecticut Supreme Court (pages 3A-6A of the appendix to the State's petition).

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REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

A. The hospital show-up was unnecessarily suggestive based upon the particular facts of this case and the applicable decisions of this court.

Rule 17.1 of the Supreme Court rules sets out the reasons for which a review on a writ of certiorari will be granted. It requires that there be "special and important reasons" therefore, including where a state court of last resort has decided a case "in conflict with the applicable decisions of this Court.

The respondents respectfully submit that the decision by the Connecticut Supreme Court in this case is not in conflict with the applicable decisions of this court.

The petitioner seems to claim that this decision is in conflict with *Manson v. Brathwaite,* 432 U.S. 116 (1977) and its progeny. However, the Connecticut Supreme Court is quite clear in stating its reasons for holding that the hospital identification procedure was unnecessary and impermissible. The decision discussed *Brathwaite, Stovall v. Denno,* 388 U.S. 293 (1967) and the many Connecticut decisions subsequent to the aforementioned cases. The Connecticut Supreme Court stated at page 202 of its decision (page 16A of the appendix to the petitioner's writ) that the show-up was unnecessary because an alleged victim was transported by the police immediately thereafter to view a vehicle operated by one of the suspects and then was taken to the police station to give a statement.

The decision was not limited to, nor based upon, the finding that the fourteen year old was seriously injured or in immediate danger of death. The more important fact was that she was not required to stay in the hospital and was taken by the police for further investigation immediately after the show-up. The Connecticut Supreme Court concluded that a less-suggestive procedure could easily have been followed in view of these facts.

Since there is no dispute that the show up was impermissibly suggestive, the only issue before this court is whether or not it is unnecessary. The decision of the Connecticut Supreme Court is not in conflict with any decision of this Court in its conclusion that the show-up was unnecessary. The lower court decision was based

upon the facts of this particular case in accordance with the many decisions of the Connecticut Supreme Court and the applicable decisions of this Court.

B. The reliability decision of the lower courts was based upon the particular facts of this case and the applicable decisions of this court.

Just as the finding that the show-up was unnecessary was fact-based, the decision on the liability of the identification was also based upon the particular facts of this case. The Connecticut Supreme Court specifically referred to the trial court's ruling on the reliability issue and held that there was no reason to hold that the trial court's finding was erroneous. The State never asked for an articulation by the trial court on its reliability findings and those findings were not inconsistent with the areas of inquiry required by the multitude of State cases on this issue, all of which are consistent with those set out by the petitioner at page 19 of its brief. The requirements cited by the petitioner are exactly those required by the Connecticut Supreme Court in *State v. Guertin,* 190 Conn. 440 (1983).

The decision of the lower court is totally consistent with the applicable decisions of this Court and is based upon the particular facts of this case. There are no Constitutional rules at issue as far as reliability is concerned. The issue is strictly based upon fact in accordance with the decisions of this court.

Contrary to the opinion of the petitioner, neither the Connecticut Supreme Court nor the trial court ignored the factors enumerated at page 19 of the petition. The State just cannot accept the fact that both the trial court and the Supreme Court did not consider the evidence on re-

liability undisputed. As a matter of fact, the trial court considered the evidence presented by the State to be totally unreliable and the Connecticut Supreme Court found no reason to disagree with this conclusion. It is obvious from the mere fact that the reliability of the identifications was contested that the evidence was disputed.

II. THERE IS NO SPECIAL AND IMPORTANT REASON FOR GRANTING THIS WRIT AS THE CONSTITUTIONAL ISSUES HAVE BEEN DECIDED BY THIS COURT AND THE SPECIFIC ISSUES IN THIS CASE ARE BASED UPON THE FACTS OF THIS PARTICULAR CASE.

The petitioner is upset that its version of the facts was not accepted by the trial court or the Connecticut Supreme Court. It states at page 22 of its petition that "the result in the State courts in intolerable . . ." and that it ". . . make(s) one wonder whether we in fact live in a civilized society." The State in making this argument forgets the most basic Constitutional right of any citizen of this country, the right to be presumed innocent.

The trial court heard several days of testimony on the various motion before it. After the hearings were completed, the trial judge was not even convinced that a crime had been committed. The alleged victim admitted that she lied to the police and told a story that was incredibly detailed sexually, although admittedly totally false. The trial court also concluded that the police officers gave information to the alleged victim after the suspects were arrested to make her second story more consistent with the arrest of the suspects.

As the petitioner states, there has been a tremendous injustice here, and that injustice has been committed upon the respondents. If the State is truly interested in correcting intolerable results and wondering what is happening to a civilized society, then the place to look for said corrections is at itself since it is the State that is acting uncivilized and intolerably in this matter.

There are no special issues here, Constitutional or otherwise, that have a national impact. The Connecticut Supreme Court merely applied the facts it had before it and those found by the trial court to the decisions of this Court and the Connecticut Supreme Court.

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CONCLUSION

The trial court and Connecticut Supreme Court decisions on the issues upon which the State is seeking certiorari are not inconsistent with any decisions of this court. The decision of the Connecticut Supreme Court applies the facts as found by the trial court to the law as set forth by this court and the Connecticut Supreme Court. Although legal considerations requested by the petitioner were followed by the lower courts. Just because the petitioner disagrees with the factual conclusions of the lower courts does not mean that those courts followed improper law. The petitioner's real disagreement is with the facts, not the law applied to said facts. That is not sufficient reason to compel review by this court. For the

aforementioned reasons, the respondents respectfully submit that the petition for a writ of certiorari be denied.

Respectfully submitted,

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